Munawar Ahmad Anees v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL REVIEW NO W-09-31 OF 2003
LOW HOP BING, HASAN LAH AND SULAIMAN DAUD JJCA
23 DECEMBER 2009

Criminal Procedure — Jurisdiction of court — Court of Appeal — Residual jurisdiction to reopen appeal — Whether court's review of its own decision viable — Courts of Judicature Act 1964 ss 26, 50 & 87

The appellant pleaded guilty to the charge of gross indecency under s 377D of the Penal Code and was convicted and sentenced to six months imprisonment by the sessions court. The appellant then filed a notice of appeal in the High Court against the decision of the sessions court. The appellant was absent on the date of the hearing of the appeal and the High Court judge dismissed the appeal in exercise of his powers under s 313(2) of the Criminal Procedure Code. The appellant's appeal against the decision of the High Court to this court was also dismissed. The appellant then filed a notice of motion in the Federal Court urging the Federal Court to invoke its power under r 137 of the Rules of the Federal Court 1994 ('r 137') to review and set aside the order made by this court to have the appeal heard on its merits. After examining the appellant's constitutional right of hearing, the Federal Court commented that 'in the absence of jurisdiction … r 137 being a procedural law, could not be invoked to confer jurisdiction to the Federal Court to review a case' and then went on to dismiss the appellant's application. This was the appellant's application by notice of motion to this court to review and set aside its own decision to dismiss the appellant's appeal against the decision of the High Court. The appellant also sought an order that the appeal before the High Court be heard on its own merits. The appellant heavily relied on the case of *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215 (CA) ('*Ramanathan*'s case') to support its submission that this court's review of its own decision was viable. The prosecution responded that the appellant should not be allowed to relitigate on an issue pertaining to the conviction and sentence meted out to him on his own guilty plea, which had been subsequently heard and determined by the High Court, the Court of Appeal and the Federal Court.

Held, dismissing the appeal:

(1) This instant application constituted an abuse of process because the appellant was urging this court to reopen an appeal which had already been dealt with by the High Court, this court and finally the Federal

Court. In effect the appellant who had already persistently pursued the due process of law was unable to accept the finality of proceedings. Where an appeal originates from the sessions court, the process of 'one trial + two appeals' is regulated by the provisions of ss 26, 50 and 87 of the Courts of Judicature Act 1964. In the instant case, which originated in the sessions court the Court of Appeal became the apex court to hear and determine any appeal (see paras 11–18).

(2) It was settled in *Ramanathan*'s case that this court had the jurisdiction to review its own decision in a given case ie a residual jurisdiction to reopen an appeal which it had already determined, particularly in cases where there was no further recourse to a party. However, the factual background in that case was readily distinguishable from that in the instant appeal. The appellant in the instant case had actually pleaded guilty to the charge proffered against him, was sentenced on that plea and then chose to be absent when his appeal came up for hearing in the High Court. Thus, there was no manifest injustice or departure from the well established principles of procedural fairness. As such that case was of no assistance to the appellant in the instant case (see paras 19–21).

[Bahasa Malaysia summary

Perayu mengaku bersalah terhadap kesalahan kelucahan melampau di bawah s 377D Kanun Keseksaan dan disabitkan dan dihukum penjara enam bulan oleh mahkamah sesyen. Perayu kemudian memfailkan notis rayuan di Mahkamah Tinggi terhadap keputusan mahkamah sesyen. Perayu tidak hadir pada hari pendengaran rayuan dan hakim Mahkamah Tinggi menolak rayuan tersebut dalam melaksanakan kuasanya di bawah s 313(2) Kanun Prosedur Jenayah. Rayuan perayu terhadap keputusan Mahkamah Tinggi ke mahkamah ini juga ditolak. Perayu kemudian memfailkan notis usul ke Mahkamah Persekutuan mendesak Mahkamah Persekutuan menggunakan kuasanya di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1997 ('k 137') untuk menyemak dan mengetepikan perintah yang dibuat oleh mahkamah ini supaya rayuan dibicarakan atas merit. Selepas menyemak hak pendengaran perlembagaan perayu, Mahkamah Persekutuan menyatakan bahawa 'in the absence of jurisdiction … r 137 being a procedural law, could not be invoked to confer jurisdiction to the Federal Court to review a case' dan kemudian menolak permohonan perayu. Ini adalah permohonan perayu melalui notis usul supaya mahkamah ini menyemak dan mengetepikan keputusannya sendiri menolak rayuan perayu terhadap keputusan Mahkamah Tinggi. Perayu juga memohon perintah bahawa rayuan di Mahkamah Tinggi didengar atas meritnya sendiri. Perayu menyandar penuh atas kes *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215 (MR) ('kes *Ramanathan*') untuk menyokong hujahannya bahawa penyemakan oleh mahkamah ini terhadap keputusannya sendiri boleh dilakukan. Pihak

pendakwaan membalas bahawa perayu tidak boleh dibenarkan untuk melitigasi semula isu berkaitan dengan sabitan dan hukuman yang diberikan kepadanya atas pengakuan salahnya sendiri, yang kemudian telah didengar dan diputuskan oleh Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan.

Diputuskan, menolak rayuan:

(1) Permohonan ini merupakan penyalahgunaan proses kerana perayu mendesak mahkamah ini membuka semula rayuan yang telah pun diputuskan oleh Mahkamah Tinggi, mahkamah ini dan akhirnya Mahkamah Persekutuan. Hakikatnya perayu yang telah berkali-kali menggunakan proses undang-undang tidak boleh menerima keputusan prosiding-prosiding tersebut. Apabila sesuatu rayuan bermula di mahkamah sesyen, proses 'one trial + two appeals' dikawal oleh peruntukan-peruntukan ss 26, 50 dan 87 Akta Mahkamah Kehakiman 1964. Di dalam kes ini, yang bermula di mahkamah sesyen, Mahkamah Rayuan merupakan mahkamah tertinggi untuk mendengar dan memutuskan apa-apa rayuan (lihat perenggan 11–18).

(2) Adalah matan di dalam kes *Ramanathan* bahawa mahkamah ini mempunyai bidang kuasa untuk menyemak keputusannya sendiri di dalam sesuatu kes iaitu bidang kuasa baki (residual jurisdiction) untuk membuka semula rayuan yang telah pun diputuskan, khususnya di dalam kes-kes di mana tidak ada jalan lain untuk sesuatu pihak. Walau bagaimanapun, latar belakang fakta di dalam kes tersebut berbeza daripada kes ini. Perayu di dalam kes ini telah sebenarnya mengaku bersalah bagi pertuduhan terhadapnya, telah dihukum bagi pengakuan tersebut dan kemudian memilih untuk tidak hadir semasa rayuannya dipanggil untuk dibicarakan di Mahkamah Tinggi. Oleh itu, tidak ada ketidakdilan melampau atau penyimpangan daripada prinsip matan keadilan prosedur (lihat perenggan 19–21).]

Notes

For cases on Court of Appeal, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2280–2282.

Cases referred to

Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771; [2008] 5 CLJ 1, FC (refd)

Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

Munawar Ahmad Anees v Public Prosecutor [2009] 2 MLJ 1; [2009] 2 CLJ 42, FC (refd)

Ramanathan a/l Chelliah v Public Prosecutor [2009] 6 MLJ 215, CA (distd)

Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 26, 50, 50(1), (1)(b), 87
Criminal Procedure Code s 313(2)
Federal Constitution arts 121(2)(a), 128(3)
Penal Code ss 354, 377D
Rules of the Federal Court 1994 r 137

Appeal from: Criminal Appeal No W-09–31 of 2003 (Court of Appeal, Putrajaya)

Manjeet Singh Dhillon (M Puravalen and Amrit Singh Pal with him) (Isharidah, Ho, Chong & Menon) for the appellant.
Awang Armadajaya (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPLICATION

[1] This application vide notice of motion filed by the applicant seeks, inter alia, to review and set aside the decision of this court which had on 30 October 2007 dismissed the applicant's appeal against the decision of the High Court. The applicant also sought an order that the appeal before the High Court be heard on its merits and to call witnesses as required.

FACTUAL BACKGROUND

[2] The applicant was originally charged at the Kuala Lumpur Sessions Court with the offence of gross decency under s 377D of the Penal Code.

[3] The applicant pleaded guilty to the charge. He was convicted and sentenced on 19 September 1998 to *six months imprisonment with effect from the date of arrest ie 18 September 1998*. On 29 September 1998, the applicant filed a notice of appeal in the High Court against the sessions court decision.

[4] Meanwhile, the applicant began serving sentence at the Kajang Prison. Subsequently, he was admitted to the National Heart Institute on 23 September 1998. He was later transferred to the Coronary Rehabilitation Ward No 29 of the Kuala Lumpur General Hospital, and remained there until the completion of his imprisonment term on 6 January 1999.

[5] When the applicant was absent on the date of the hearing of his appeal on 9 September 2003, the learned High Court judge, in exercising the powers under s 313(2) of the Criminal Procedure Code, dismissed the appeal. Section 313(2) reads as follows:

> (1) ...
>
> (2) If the appellant does not appear to support his appeal the Court may consider his appeal and make such order thereon as it thinks fit:
>
> Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction …, except on such terms as it thinks fit to impose.

[6] The applicant's appeal against the decision of the High Court was dismissed by this court on 30 October 2007.

[7] On 15 November 2008, the applicant filed a notice of motion in the Federal Court urging the Federal Court to invoke its power under r 137 of the Rules of the Federal Court 1994 so as to review and set aside the order made by this court and to have the appeal heard on its merits. That notice of motion was unanimously dismissed by the Federal Court on 30 October 2008, as reported in *Munawar Ahmad Anees v Public Prosecutor* [2009] 2 MLJ 1; [2009] 2 CLJ 42.

[8] The Federal Court, speaking through Zulkefli Makinudin FCJ, examined the applicant's constitutional right of hearing, in the light of s 313(2), and found that since the applicant had failed to appear personally in court for his appeal to be heard on several occasions whereby the hearing of the appeal had to be repeatedly postponed, that would be a ground to justify the dismissal of the applicant's appeal.

REVIEW JURISDICTION

[9] Learned counsel Mr Manjeet Singh Dhillon (assisted by Mr M Puravalen and Mr Amrit Singh Pal) sought support in *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215 (CA) and submitted that a review of its own decision is viable:

(a) If it can be shown that there was a probability of a significant injustice which must be clearly established; and

(b) If there was no effective alternative remedy to correct this injustice.

[10] Mr Awang Armadajaya, learned deputy public prosecutor, responded that the applicant should not be allowed to relitigate on an issue pertaining to the conviction and sentence meted out to him on his own guilty plea which has been subsequently heard and determined by the High Court, the Court of Appeal, and the Federal Court.

[11] In our view, the applicant is urging us to reopen the appeal which has been dealt with by the High Court on 9 September 2003, then by this court which had delivered its decision on 30 October 2007 dismissing his appeal, and finally by the Federal Court, as alluded to above. The instant application before us reflects the conduct of an indefatigable idealist who is unable to accept the finality of proceedings. He chooses to plod on, notwithstanding that the instant application clearly constitutes an abuse of the process of the court.

[12] As a matter of fact, the applicant had, prior to the instant application, already persistently pursued the due process of law. He had exercised his right in the trial court ie the sessions court, followed by two appeals viz, one intermediate appeal in the High Court and a final appeal in the Court of Appeal. This pyramidal judicial system of 'one trial + two appeals' has been ably explained by Mohtar Abdullah FCJ (as he then was) in *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 at p 429, with specific reference to the process of appeals from the High Court to the Federal Court under arts 121(2)(a) and 128(3) of the Federal Constitution in the following passage:

> A harmonious interpretation of art 128(3) vis-à-vis art 121(2)(a) of the Constitution will promote the purpose or object of the law providing for a three tiered pyramidal judicial system of 'one trial + two appeals' as envisaged in the Constitution and structured accordingly in the CJA.

[13] Where an appeal originates from the sessions court, the process of 'one trial + two appeals' is regulated by the provisions of ss 26, 50 and 87 of the Courts of Judicature Act 1964.

[14] Section 26 sets out the appellate criminal jurisdiction of the High Court ie to hear criminal appeals from subordinate courts viz sessions and magistrate's courts.

[15] Section 50(1)(b) provides for the jurisdiction of this court to hear and determine any criminal appeal against any decision made by the High Court in the exercise of eg appellate jurisdiction in respect of any criminal matter decided by eg the sessions court.

[16] Section 87 confers jurisdiction on the Federal Court to hear and determine any appeal from any decision of the Court of Appeal in the exercise of its appellate jurisdiction in respect of any criminal matter decided by the High Court in exercising its original (but not appellate) jurisdiction.

[17] Section 50(1) was considered in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753 at p 765; [2008] 5 CLJ 201 at p 215. Zaki Tun Azmi PCA (now Chief Justice) concluded that:

> [36] According to s 50(1), criminal cases decided by the sessions court may be appealed up to the Court of Appeal while those made by the magistrate is also appealable up to the Court of Appeal, but only with leave of the Court of Appeal. Section 50 read with s 87 means that, criminal matters originating in the sessions court and the magistrate court must end at the Court of Appeal.

[18] In *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771; [2008] 5 CLJ 1 (FC), the issue was whether r 137 of the Rules of the Federal Court 1994 permitted an appeal to the Federal Court in a matter that commenced in the sessions court hearing motor vehicle accident cases. Abdul Hamid Mohamad Chief Justice (as he then was) delivered the judgment of the Federal Court and held (paras [15], [20], [22] and [28]) that r 137 'cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act 1964 and other statutes. If the law provides for an appeal, then there is. It is not within the jurisdiction of the court to create appeals when the statute does not provide or, as in this case, clearly does not permit. Since there is no further appeal to this court, then the Court of Appeal becomes the apex court as far as actions and suits in respect of motor vehicle accidents are concerned. That is the intention of the legislature and it is incumbent upon this court to give effect to it. When the law states that the decision of the Court of Appeal is final, then the appeal process should stop at the Court of Appeal; it cannot be allowed to come to this court by way of a review process under r 137'.

[19] Reverting to the mainstream of the instant application, the applicant has relied heavily on *Ramanathan a/l Chelliah*. There, the accused was convicted by the sessions court on two charges of outraging modesty under s 354 of the Penal Code. On appeal, the accused raised several points. However, the High Court confined itself to only the delay point and the direction as to the standard of proof, and quashed the conviction. The prosecution's subsequent appeal to the Court of Appeal was allowed and the conviction was reinstated. The affidavits revealed that when the prosecution's appeal came before the Court of Appeal, counsel on both sides only argued on the two points relied upon by the High Court to quash the conviction. However, the Court of Appeal proceeded to deal with other points in the case

and had rejected the attempt by the accused to address the arguments on the other points, on the ground that the court was functus officio. Hence, the application by the accused to set aside the order on the ground that it had been made without an opportunity being given to him to support the acquittal on grounds other than those given by the High Court. Two issues arose for the court's determination viz:

(a) Whether the court had jurisdiction to review its earlier decision in an appeal heard and disposed by it?

(b) If there was jurisdiction, the circumstances in which the review was available.

[20] In allowing the application, Gopal Sri Ram JCA (now FCJ) who delivered judgment for this court held:

(1) It is settled that this court had jurisdiction to review its own decision in a given case ie a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there was no further recourse to a party. On the facts, since the accused was tried in a subordinate court, the Court of Appeal was the court of last resort. The jurisdiction to reopen and review was therefore important in that case to ensure that a manifest injustice does not go by uncorrected (see paras 2–3).

(2) The residual jurisdiction will be exercised if it can be shown that there was a probability of a significant injustice which must be clearly established and there was no effective alternative remedy to correct the injustice. That case was one in which an injustice was occasioned and there was no effective alternative remedy available to the accused (see paras 4–5).

(3) The accused was clearly entitled to put forward other arguments in support of the orders made by the High Court in response to the prosecution's appeal. However that opportunity was denied to the accused and that constituted a serious departure from well established principles of procedural fairness, a miscarriage of procedural justice warranting the exercise of the residual power of the court to set aside its earlier judgment (see para 6).

[21] With the utmost respect, we found the factual background in *Ramanathan a/l Chelliah* readily distinguishable from that in the instant appeal, wherein the applicant had actually pleaded guilty to the charge preferred against him, as a result of which he was convicted and sentenced. He then chose to be absent when his appeal came up for hearing and determination in the High Court. Given that factual background, the applicant's appeal to this court was eventually dismissed. We therefore do not

see any manifest injustice or departure from the well established principles of procedural fairness. That being the case, *Ramanathan a/l Chelliah* is obviously of no assistance whatsoever to the applicant herein.

[22] It is singularly significant for us to refer to the applicant's own application sub nom, *Munawar Ahmad Anees* which clearly shows that the applicant had already gone to the Federal Court on the same subject matter as in the instant appeal. That was the application by the applicant, to move the Federal Court in order to invoke its power under r 137 to review and set aside the order made by this court. Without any difficulty, the Federal Court had dismissed that application. Zulkefli Makinudin FCJ, delivering the judgment of the court, held that:

> Since the applicant's case originated from the sessions court and the High Court had heard this case in its appellate capacity and was not acting under its original jurisdiction, and wherein the applicant had exhausted his rights of appeal at the Court of Appeal, it therefore followed that the Federal Court could not deal with this matter for want of jurisdiction as stipulated under s 87 of the Courts of Judicature Act 1964 ('CJA'). In view of the provisions in s 87 of the CJA, the Federal Court is only reposed with the jurisdiction to hear an appeal from the decision 'in respect of any criminal matter decided by the High Court in its original jurisdiction'. In the absence of jurisdiction such as provided by s 87 of the CJA, r 137 of the RFC being a procedural law, could not be invoked to confer jurisdiction to the Federal Court to review a case. On this ground alone, this application ought to be dismissed (paras 10, 11, 13 & 19).

CONCLUSION

[23] On the foregoing grounds, we held that the application herein was wholly without merits. We had accordingly dismissed it.

Application dismissed.

Reported by Kohila Nesan